Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1681

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY JOSEPH RUSSO, JR. AND
H. PETER YOUNG, PETITIONERS

v.

JOHN N. MITCHELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this *Bivens* action alleging inter alia that respondent Mitchell authorized an illegal warrantless wiretap, the court of appeals properly found him entitled to qualified immunity on the ground that it appeared from the objective record that his actions could reasonably have been motivated by national security concerns.

2. Whether the court of appeals erred in upholding summary judgment against petitioners' claims that their conversations were illegally intercepted by unknown wiretaps, where the government submitted affidavits denying that any such interceptions took place.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 807 F.2d 204. The orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1986, and a petition for rehearing was denied on January 12, 1987 (Pet. App. 8a). The

petition for a writ of certiorari was filed on April 13, 1987 (April 12, 1987 was a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose out of the "Pentagon Papers" criminal prosecution, during which the government acknowledged that federal investigators had overheard one or more members of the defense team through warrantless wiretaps. Petitioner Russo, a defendant in that case, and his defense lawyer, petitioner Young, along with Russo's co-defendant, Daniel Ellsberg, and other members of the defense team who are no longer parties, brought this action against a number of government officials,[1] asserting violations of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. III) 2510-2520, arising from the interception of plaintiffs' telephone conversations. Pet. App. 2a-3a.

After the complaint was filed, plaintiffs (including petitioners) served a series of interrogatories

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[1] The defendants named in the complaint included former Attorneys General John Mitchell and Richard Kleindienst; L. Patrick Gray III, former Director of the Federal Bureau of Investigation; John E. Ingersoll, former Director of the Bureau of Narcotics and Dangerous Drugs; Vernon D. Acree, former Commissioner of Customs; James J. Rowley, former Director of the United States Secret Service; Charles Walters, former Commissioner of the Internal Revenue Service; William Rogers, former Secretary of State; Melvin Laird, former Secretary of Defense; and Richard Helms, former Director of Central Intelligence. The complaint stated that the defendants were sued in both their individual and official capacities, but the plaintiffs never asserted any claims for equitable relief.

upon the defendants seeking information regarding the wiretaps. Pet. App. 3a; *Ellsberg* v. *Mitchell*, 709 F.2d 51, 53-55 & n.3 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984). The discovery responses revealed that petitioner Young had been overheard on four occasions during 1970 and 1971 in the course of wiretap surveillance of the Los Angeles Chapter of the Black Panther Party, and that petitioner Russo had not been overheard on any domestic national security wiretap. Pet. App. 3a. Documents produced in response to plaintiffs' discovery demands included the logs of overheard conversations and the memoranda authorizing the wiretap. An explanation of the rationale underlying the wiretap authorization also was provided in response to plaintiffs' interrogatories.[2]

In three separate orders, the district court dismissed petitioners' claims arising out of the Los Angeles wiretap.[3] First, the court entered summary

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[2] The government invoked the state secrets privilege in refusing to supply information regarding any foreign intelligence wiretaps. The district court upheld the privilege and entered a judgment dismissing the claims relating to such wiretaps. The court of appeals generally upheld that determination, and this Court denied certiorari. *Ellsberg* v. *Mitchell*, *supra*. The district court subsequently granted summary judgment in favor of defendants Ingersoll, Walters, Kleindienst, Gray, and Acree on the ground that they were not involved in any of the wiretap surveillance that remained at issue in this case. See Pet. App. 12a. The court of appeals found that petitioners had waived their right to challenge that order (*id.* at 4a n.1), and petitioners do not appear to seek review of that determination. Thus only Mitchell, Rowley, Rogers, Laird, and Helms are respondents in this Court.

[3] Prior to the entry of these orders, the court entered a protective order barring petitioners from deposing former Attorney General Mitchell (Pet. App. 11a).

judgment in favor of respondents James Rowley, William Rogers, Melvin Laird, and Richard Helms. It held that Rowley and Rogers could not be held personally liable because they were not alleged to be involved in any way in the asserted illegal electronic surveillance, and that Laird and Helms likewise could not be held liable because, although they were aware of the Black Panther wiretap, none of the relevant intercepted information was disclosed to anyone outside of the Federal Buréau of Investigation. Pet. App. 12a-16a, 20a-22a. The court rejected petitioners' claim that they were entitled to additional discovery concerning the possible liability of these four respondents (*id.* at 13a-14a).

The district court entered a separate order dismissing petitioner Russo's claims on the ground that "Russo was not the subject of, nor was he overheard on, any warrantless electronic surveillance" that remained at issue in the case (Pet. App. 18a). The court found that Russo accordingly lacked standing to pursue this action.

Finally, applying the standard set forth in this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the district court held that former Attorney General Mitchell was entitled to qualified immunity from damages liability on petitioner Young's claims (see Pet. App. 23a-30a). The court observed that Young conceded that at the time Mitchell authorized the wiretap, "he could not reasonably have known that the Fourth Amendment or Title III required warrants for national security wiretaps" (*id.* at 25a (footnote omitted)). Young instead claimed that "the Fourth Amendment and Title III were violated if [Mitchell's] motives for authorizing the surveillance were not legitimately grounded in national

security concerns. Summary judgment, according to [Young] is thus inappropriate since [Young] has had no opportunity to conduct discovery related to Mitchell's motives for ordering the wiretap" (*id.* at 26a).

Relying on the evidence produced in the present case as well as the court of appeals' decision in *Sinclair* v. *Kleindienst*, 645 F.2d 1080 (D.C. Cir. 1981), which also involved a wiretap of an office of the Black Panther Party, the district court found "more than sufficient justification for [Mitchell's] claim that the wiretaps were undertaken for national security purposes" (Pet. App. 27a-28a). Because "[t]he objective record thus establishe[d] a valid rationale for the surveillance," the court stated, "*Harlow* precludes us from continuing further and asking if national security was the actual or only reason for [Mitchell's] conduct" (*id.* at 28a-29a (footnote omitted)). The court went on to note that "even under a subjective qualified immunity test" Mitchell would be entitled to immunity. "None of the documents [Young] uses in an attempt to demonstrate the existence of material issues of fact relate to electronic surveillance and many of the documents predate [Mitchell's] tenure as Attorney General. Overall, [Young's] speculations that [Mitchell] may have undertaken the surveillance for illegitimate reasons do not constitute factual issues which are material to the immunity questions before this court." *Id.* at 29a n.5 (citation omitted).

2. The court of appeals unanimously affirmed (Pet. App. 1a-7a). With respect to the dismissal of the claims against former Attorney General Mitchell, the court upheld the district court's conclusion that Mitchell was entitled to immunity. In a decision ren-

dered the same day in the companion case of *Halperin* v. *Kissinger*, 807 F.2d 180 (D.C. Cir. 1986), the same panel of the court of appeals concluded that where "officials claiming immunity purported at the time they engaged in the challenged conduct to have been motivated by national security concerns, a purely objective inquiry into the pretextuality of the purpose is appropriate. That is to say, if the facts establish that the purported national security motivation would have been reasonable, the immunity defense will prevail" (807 F.2d at 188 (footnote omitted)). Thus, the defendant's action must be assessed with reference to the objective record, not with an eye toward ascertaining the defendant's subjective intent. See also *id.* at 186-193.

Here, the court of appeals found that respondents had "alleged sufficient objective facts to place the wiretap of the Los Angeles Chapter of the Black Panther Party * * * in a rational national security context." Pet. App. 5a, citing *Sinclair* v. *Kleindienst*, *supra*. The court noted that "[e]ven after considerable document discovery, [petitioners] can point to no objective facts that suggest a conclusion contrary to" that reached in *Sinclair* v. *Kleindienst*, 645 F.2d at 1084—that Mitchell's authorization of surveillance and wiretapping of Black Panther Party activities was motivated by national security concerns (Pet. App. 5a).

The court of appeals also upheld the district court's grant of summary judgment in favor of respondents Rowley, Rogers, Laird, and Helms, and the dismissal of petitioner Russo's claims. It rejected petitioners' effort to create a disputed issue of fact by simply contradicting the government's denial that petitioners were subject to other nonprivileged wiretaps,

stating that "[t]he mere denial of a denial * * * does not suffice to create a genuine issue of fact for purposes of Fed. R. Civ. P. 56(c)" (Pet. App. 6a). The court noted that "[t]he extensive documentary discovery in which [petitioners] have already engaged (supplemented by Russo's Freedom of Information Act request) has turned up no concrete facts that would indicate that nonprivileged wiretaps existed," and declined to allow "a fishing expedition in government waters on the basis of such speculation" as petitioners offered to justify further discovery (*id.* at 7a).

ARGUMENT

Petitioners challenge the decision of the court below in two primary respects. They argue that the court erred, first, in upholding the qualified immunity of respondent John Mitchell from liability for authorizing the wiretap of the Los Angeles Chapter of the Black Panther Party and, second, in foreclosing further litigation of petitioners' claims that they had been intercepted by other unknown and unspecified government wiretaps.

1. Petitioners contend (Pet. 11-34) that the courts below erred by concluding that respondent Mitchell was entitled to immunity for claims growing out of the warrantless national security wiretap. This Court considered a similar factual situation in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), holding that prior to 1972 it was not clearly established that the Constitution and Title III barred warrantless wiretaps for national security purposes and that former Attorney General Mitchell was therefore entitled to immunity under the standard announced in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (see 472 U.S. at 530-535). The plaintiff in *Forsyth* argued that

Mitchell was not entitled to summary judgment on the immunity issue because his actions might not have been motivated by national security purposes. This Court rejected that argument, stating that the district court had "held a hearing on the purpose of the wiretap and took Mitchell at his word that the wiretap was a national security interception, not a prosecutorial function for which absolute immunity was recognized" (472 U.S. at 535 n.13). Here, too, the courts below found that Mitchell was entitled to immunity because the wiretap at issue was justified by national security concerns. Pet. App. 5a, 27a-29a.

a. Petitioners first argue (Pet. 17-21) that the court of appeals applied the wrong standard in determining whether the wiretap was justified by national security concerns because the court restricted its inquiry to the objective record regarding the reasons for the wiretap and held that it was not appropriate to examine Mitchell's subjective motivation in approving the wiretap.

In *Harlow* v. *Fitzgerald*, *supra*, this Court addressed the portion of the qualified immunity standard that denied immunity to officials who failed to act in good faith. The Court observed that "[t]here are special costs to 'subjective' inquiries of this kind" (457 U.S. at 816). It found that "[j]udicial inquiry into subjective motivation * * * may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government" (*id.* at 817 (footnotes omitted)). The Court therefore eliminated the subjective component of the immunity standard, holding that an official's entitlement to immunity turns solely on the "objective reasonableness" of his conduct "as meas-

ured by reference to clearly established law" (*id.* at 818 (footnote omitted)).

In *Halperin* v. *Kissinger*, 807 F.2d 180 (D.C. Cir. 1986), a companion case to the case at bar, the court of appeals found that—under the legal standards that were clearly established at the time of the events at issue here—the legality of a warrantless wiretap turned upon its purpose. If the wiretap had a national security purpose, a government official could, prior to 1972, have reasonably believed that the wiretap fell outside the warrant requirement imposed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. III) 2510-2520, and the Fourth Amendment. Thus, as the court noted, the "clearly established law" test suggested an inquiry into an official's subjective motivation in authorizing the wiretap. See 807 F.2d at 184-185. As the court also noted, however, such an inquiry is to some degree inconsistent with the principles that underlie this Court's decision in *Harlow*, because it requires an investigation of subjective motivation similar to the subjective inquiry rejected by the Court in *Harlow* (see *Halperin*, 807 F.2d at 185-187).

In *Halperin*, the court of appeals resolved the tension between the inquiry mandated by the relevant clearly established law and the principles set forth in *Harlow* by holding that an inquiry into government officials' subjective motivation is not appropriate in the national security context. The court observed that the factors weighing against subjective inquiry were especially strong in that context: the important government interest in preventing hindrance of the proper performance of national security duties, the need for secrecy, and the prominence of the separation of powers concerns noted by the Court in reject-

ing the more generalized subjective inquiry in *Harlow*. See *Halperin*, 807 F.2d at 187. The court also stated that (*ibid.* (citations omitted))

> [t]he concept of a special rule for national security matters is no stranger to court-made law—from reduced due process requirements, to increased ability to impinge upon interests protected by the first amendment, to authority (where foreign powers are involved) to conduct warrantless searches.

At the same time, the court in *Halperin* expressly declined to adopt a rule governing all situations in which clearly established law directs a subjective inquiry. It concluded only that, in the national security context, "a purely objective inquiry into the pretextuality of the purpose is appropriate. That is to say, if the facts establish that the purported national security motivation would have been reasonable, the immunity defense will prevail" (*Halperin*, 807 F.2d at 188 (footnote omitted)).[4]

We submit that the *Halperin* court properly balanced the unique considerations present in the national security context, adopting a rule that preserves a plaintiff's ability to defeat immunity while at the same time avoiding the disruption that would result from a full-blown inquiry into the subjective motivations of government officials who perform national security functions. It is noteworthy that the District of Columbia Circuit appears to have limited this rule to the national security context, specifically rejecting

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[4] Petitioners attempt (Pet. 20) to draw an artificial distinction between domestic and foreign national security. The two areas are obviously related and implicate similar policy concerns.

the argument that *Harlow* bars all inquiry into a government official's subjective motivation when government functions other than national security operations are implicated by a plaintiff's claims. *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1431-1433 (D.C. Cir. 1987), reh'g en banc granted on other grounds, No. 85-6071 (D.C. Cir. May 8, 1987).

Petitioners' challenge to the standard applied by the court of appeals consists solely of flat assertions that the court of appeals erred. Thus, petitioners argue (Pet. 17-20) that the court of appeals' decision is not directly compelled by this Court's decision in *Harlow* v. *Fitzgerald*, *supra*, or by this Court's prior decisions recognizing special constitutional rules where national security is involved. But the court of appeals did not contend that the result that it reached was mandated by these prior decisions. Rather, it found that the principles underlying those decisions weighed against an inquiry into subjective motivation in the national security context, and adopted a legal standard consistent with that determination. See *Halperin*, 807 F.2d at 186-188.

Putting the merits of the court of appeals' rule to one side, moreover, petitioners have presented no reason why this Court should grant plenary review to consider the correctness of that rule. They do not contend that the rule adopted by the court below conflicts with a decision of this Court or another court of appeals, and they cannot establish that the proper interpretation of an immunity standard that applies solely to cases involving pre-1972 government wiretaps is an issue of continuing legal importance. Finally, this case presents no occasion to address the general question of the proper approach under *Harlow* where clearly established law suggests a sub-

jective inquiry. Both the court below and other courts of appeals have concluded that an inquiry into subjective intent *is* permissible outside the national security context. There is thus no justification for review by this Court.[5]

Petitioners also contend (Pet. 26-30) that there was insufficient evidence to support the factual finding of the lower courts that the wiretap had a national security purpose. Both courts below found that the relevant facts led inexorably to the conclusion that the wiretap was supported by national

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[5] Petitioners assert (Pet. 21-25) that the decision below conflicts with the decision in *Halperin*, which was issued by the same panel of the District of Columbia Circuit on the same day as the decision in the present case. First, the purported conflict is illusory. The court of appeals in the present case noted that there was no objective evidence weighing against the conclusion that the wiretap on which petitioner Young was overheard was justified by national security concerns (Pet. App. 5a). That determination appears to us to satisfy the standard announced in *Halperin*—that any reasonable factfinder would conclude that the wiretap was justified by national security concerns. Second, even if the decisions could not be reconciled, they would create only an intra-circuit conflict to be resolved by the District of Columbia Circuit, not a conflict warranting review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioners also argue (Pet. 30-31) that there is an "enormous" potential that pretextual justifications would not be discovered under the court of appeals' standard. However, a defendant would be entitled to summary judgment only if any reasonable factfinder would conclude on the objective record before it that the asserted national security justification was objectively reasonable. See *Halperin*, 807 F.2d at 189. Petitioners' complaints (Pet. 32-33) about the unavailability of additional discovery are beside the point, because they seek discovery concerning Mitchell's subjective motivation, which is irrelevant under the objective *Halperin* test that applies where national security matters are concerned.

security concerns. Pet. App. 5a, 27a-29a; see also *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1082-1085 (D.C. Cir. 1981) (finding wiretap of Black Panther Party office supported by national security concerns). In light of these concurrent findings of fact, there is no need for this Court to reconsider that fact-bound question. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

b. Even if the court of appeals erred by concluding that the assessment of Mitchell's motivation should be limited to the objective record, review would not be appropriate here because petitioners would fare no better under a subjective standard. Rule 56 of the Federal Rules of Civil Procedure provides that a party opposing summary judgment must "set forth specific facts showing that there is a genuine issue for trial" or state the reasons why he cannot set forth such facts. Fed. R. Civ. P. 56(e) and (f); see also *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Mar. 26, 1986), slip op. 11 (citation and footnote omitted) ("the issue of fact must be 'genuine.' When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts").

The district court found that, despite the discovery already allowed in this case, petitioners' submissions did not satisfy that standard. It stated that petitioner Young's "speculations that [Mitchell] may have undertaken the surveillance for illegitimate reasons do not constitute factual issues which are material to the immunity questions before this court" (Pet. App. 29a n.5). The district court correctly concluded that it was proper to grant summary judgment for respondent Mitchell on the present record.

2. Petitioners also contend (Pet. 35-40) that summary judgment should not have been granted as to their allegations that they were overheard on other unknown, nonprivileged wiretaps. They claim that government assurances (in the form of affidavits) that there have been no such wiretaps are inherently untrustworthy, and that, on that basis alone, there is a triable issue of fact. There is no reason for review by this Court of either this fact-bound question, or the issue of whether additional discovery was appropriate on the facts of this case.

The court of appeals' decision is in complete accord with this Court's admonition that, when government officials are sued in their individual capacities, "[i]nsubstantial lawsuits [should] be quickly terminated by federal courts alert to the possibilities of artful pleading" (*Butz* v. *Economou*, 438 U.S. 478, 507 (1978)). Since the "extensive documentary discovery" already obtained by petitioners indicates that any further discovery would be "fruitless" (Pet. App. 7a), the courts below correctly concluded that further discovery was not appropriate on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40392